

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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**FILE:** B-211513

**DATE:** October 20, 1983

**MATTER OF:** Great Lakes Dredge & Dock Company  
and American Dredging Company

**DIGEST:**

1. Agency decision to set aside procurement for small business, challenged on the basis that the set-aside improperly resulted from a decision by an allegedly unauthorized agency official to sustain a Small Business Administration appeal of the contracting officer's initial determination not to set aside the procurement, is not legally objectionable where the agency head subsequently approved the determination to uphold the appeal.
2. Contention that contracting officer's determination not to set aside a procurement for small business can be reversed on appeal to agency head by SBA only where that determination is found to be arbitrary and capricious is without merit where governing regulations impose no such standard.

Great Lakes Dredge & Dock Company and American Dredging Company protest the U.S. Army Corps of Engineers' decision to issue invitation for bids (IFB) No. DACW65-83-B-0002 as a total small business set-aside. The protesters contend that the contracting officer's original decision to solicit this procurement on an unrestricted basis was overruled by an agency official who did not have the authority to do so and who, in any event, did not use the proper standard of review. We believe that the decision to issue the solicitation as a set-aside was proper and we deny the protests.

The contracting officer at the Corps' Norfolk District originally decided to issue the solicitation for maintenance dredging in Norfolk Harbor on an unrestricted

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basis. While the market survey conducted by the contracting officer indicated that there were at least two potential small business bidders willing to compete, the contracting officer did not believe that the procurement should be set aside as he felt that one of the small businesses might not be able to bid a reasonable price because of the start-up costs it would incur in transporting its dredging equipment from a location 350 miles away to the jobsite in Norfolk. The Small Business Administration (SBA) appealed the contracting officer's decision to the Secretary of the Army pursuant to Defense Acquisition Regulation (DAR) § 1-706.3(e). In connection with this appeal, the SBA's procurement center representative pointed out that the same small business which the contracting officer concluded would not be able to submit a reasonable price won the most recent contract for dredging work at Norfolk, even though the firm had to incur relatively high start-up costs to move its dredge to the contract area.

By letter of March 22, 1983, the Army's Director of the Office of Small and Disadvantaged Business Utilization (Director) notified the Corps and the SBA that the appeal was sustained and directed the Corps to set the procurement aside for small business. The Corps thus issued the solicitation on April 4. The Corps received six bids, three of which were within 125 percent of the government estimate.

The protesters first contend that the decision to sustain SBA's appeal was improper because it was not made by the appropriate official within the Army. Specifically, the protesters argue that DAR § 1-706.3(e) provides for an appeal by the SBA Administrator to the Secretary of the Army. Here, they state, the decision was not made by the Secretary but by the Director who did not have the authority to make such a decision. Thus, the protesters conclude, the Director could not overrule the contracting officer's determination and the solicitation, issued on the Director's instruction, is invalid and should be canceled.

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We need not decide whether the Director has the authority to determine SBA appeals<sup>1</sup> because the record contains a letter dated April 11 from the Secretary of the Army approving the Director's decision to set aside this procurement for small business. Thus, the Secretary clearly adopted the Director's determination. Further, we do not believe it is relevant, as the protesters argue, that the Secretary's letter approving the decision to set the procurement aside was dated a few days after the solicitation was issued. The fact is that the Secretary approved the set-aside, and that approval relates back to the date that the solicitation was issued. See generally Fish and Wildlife Service-Fiscal Year Chargeable on Ratification of Contract, B-208730, January 6, 1983, 83-1 CPD 75. In any event, a set-aside determination is permissible after a solicitation is issued, Gill Marketing Co., Inc., B-194414.3, March 24, 1980, 80-1 CPD 213, so that even if the solicitation had been issued without the set-aside restriction initially, it could have been converted by amendment to a set-aside.

The protesters also contend that the contracting officer's determination could be reversed on appeal only if the reviewing official can show that the decision was arbitrary and capricious.

The regulations provide for SBA appeal of a contracting officer's decision concerning a small business set-aside when the SBA disagrees with that decision. DAR § 1-706.3(e). There is no requirement in the regulations that the agency reviewing official find the contracting officer's decision arbitrary and capricious before the official can sustain an SBA appeal. The protesters' reliance on our decisions in this area is misplaced. Those decisions (they cite Belfort Instrument Co., B-202892, July 15, 1981, 81-2 CPD 38, for example) stand for the proposition that a protester, in order to successfully

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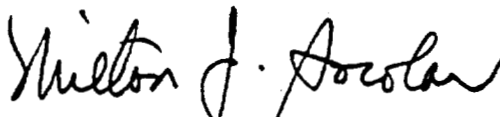
<sup>1</sup>Although it appears from a March 16, 1983 memorandum from the Deputy Under Secretary of the Army that the Director has indeed been delegated such authority.

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challenge a contracting officer's set-aside decision, must show that the contracting officer acted in an arbitrary or capricious manner. Our Office has never imposed that standard upon the contracting agencies where, as here, the regulations governing SBA appeals impose no such standard. See 53 Comp. Gen. 58 (1973); National Steel and Shipbuilding Company; Atkinson Marine Corporation; Triple "A" South, B-202399, .2, .3, December 15, 1981, 81-2 CPD 471.

Finally, the protesters argue that the agency acted arbitrarily in ordering that the subject solicitation be set aside without access to or analysis of more current data. We disagree. The Corps has advised us that there were no other procurements for dredging services in this area during the period between the contracting officer's initial determination and the issuance of the subject solicitation. Therefore, the procurement history that the Army used in reaching its decision to set aside this requirement remained unchanged.

The protests are denied.

*for*   
Comptroller General  
of the United States